UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between DR. N. DEAN PASHA, Petitioner, –v– JOHN M. JANSHESHKI and STARBOARD INTERNATIONAL, LLC, Respondents.	JUDGE PATTERSON Civil Action No. 14 CV 0799

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CASHIERS

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO VACATE PARTS OF ARBITRATION AWARD ON COUNTERCLAIM ONLY

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Dated: February 7, 2014
Hackensack, New Jersey

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In support of his Petition to Vacate Parts of Arbitration Award On Counterclaim Only, Dr. N. Dean Pasha ("Pasha"), by and through his counsel, respectfully submits this Memorandum of Law.

I. INTRODUCTION.

Pasha seeks an Order vacating and/or remanding parts of the final arbitral award issued on November 11, 2013 ("Final Award", Exhibit 1[1]) only as to the determination of the amount of damages for the breach of the Transfer Agreement (agreement to transfer a 24.5% ownership interest in a joint venture worth millions to Pasha) and its implied covenants and related specific performance claims in Pasha's Counterclaim. Petitioner contends that the Final Award should be vacated and/or remanded as to these issues in the Counterclaim on the grounds that the Arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award submitted was not made (9 U.S.C. § 10(a)(4)) and refused to hear evidence pertinent and material to the controversy (9 U.S.C. § 10(a)(3)) in that:

- The Final Award improperly reflects the Arbitrator's own notion of economic justice rather than drawing its essence from the contract between the parties;
- After finding that there was a breach of a contract to provide 24.5% of the shares in a joint venture, the Final Award does not specify any amount of damages for this breach even though there was ample evidence that the shares had value and that there were substantial damages;
- The failure to award a specific amount of damages did not finally resolve all issues submitted to arbitration and will result in further litigation to finalize the obligations of the parties;

[1] The Exhibits referenced in this Memorandum are attached to the concurrently filed Declaration of Michael R. Newman.

- After finding that there was a breach of contract to provide the 24.5% of the shares in a joint venture, the Final Award was imperfectly executed since it failed to award any damages for the found breach of contract and in the alternative to award specific performance to provide the shares;

- The Final Award manifestly disregarded the law in finding that it would not require specific performance of the contract to provide 24.5% of the shares in a joint venture after finding that while there was a breach of contract to provide such shares no damages of any amount would be awarded;

- The Final Award is incomplete and contradictory.

As will be discussed below, and as set forth in the Petition, the Final Award has a major deficiency that this Court must fix and is empowered to fix under the Federal Arbitration Act ("FAA"). While the Arbitrator found that the Transfer Agreement was an enforceable contract, that it was breached, and that there were no defenses to the breach, the Final Award fails to award any amount of damages to Pasha for his failure to receive 24.5% ownership in a joint venture. Pasha did not even get awarded a single dollar, even though there was ample evidence in the arbitration that the last value set for shares of the joint venture would make a 24.5% interest worth $3.92 million. Adding to this deficiency, the Arbitrator also did not order specific performance of this promise to provide the shares. Under these circumstances, Pasha is entitled to relief from this Court so that he obtains damages for the breach of contract claim or specific performance.

II. PERTINENT FACTS AND PROCEDURAL HISTORY.

The relevant facts are set forth in the concurrently filed Petition to Vacate at ¶¶9-26 and are incorporated into this Memorandum. The relevant procedural history is set forth in the

Petition to Vacate at ¶¶27-35 and is incorporated herein. The following will focus on the key facts and findings of the Arbitrator for purposes of demonstrating why this Court should provide relieve to Pasha and vacate and/or remand.

Claimant John M. Jansheski ("Jansheski") and Pasha each had 50% of the shares of a joint venture memorialized in a May 26, 2005 Joint Venture Agreement (the "JV Agreement", Exhibit 2) and incorporated in the United Kingdom ("UK") as Passion 4 Health/DenTek, Ltd. (the "JV"). Pasha, who resides in the UK, was in charge of administering the day-to-day business of the JV, which had its principal place of business in Surrey, UK.

The JV Agreement contains a provision, Section 12.6(f), which is a buyout provision. Pursuant to Section 12.6(f), Jansheski had the unilateral right, after two years of operation of the JV, to buy out Pasha's interest in the JV upon Jansheski 's sale of DenTek Oral Care, Inc. ("DenTek") to a third party. TSG Consumer Partners, LLC ("TSG"), began negotiations with Jansheski to acquire controlling interest in DenTek. Ultimately, TSG offered Jansheski $110 million for DenTek and 50% of the JV.

Jansheski initiated negotiations with Pasha to acquire Pasha's 50% interest in the JV. Eventually, Jansheski and Pasha agreed that Pasha would sell his 50% of the shares of the JV for $8 million and Jansheski providing to Pasha 24.5% of the shares of the JV upon certain terms and conditions. The "Closing" was to take place (1) when the "DenTek Transaction" (the sale of Jansheski's capital stock in DenTek to TSG) had closed, and (2) when DenTek and Jansheski had agreed upon an amended or replacement joint venture agreement for the JV to be entered into among DenTek, Jansheski and Pasha. Jansheski would have the sole and exclusive right to negotiate the amended or replacement joint venture agreement on behalf of Pasha, which Pasha agreed to execute. In the event that Jansheski and DenTek did not agree to an amended or

replacement joint venture agreement after 180 days from the closing of the DenTek Transaction, Jansheski had to submit any disputes for arbitration and any amended or replacement joint venture agreement resulting from such arbitration would be deemed to be the new or replacement joint venture agreement. The purchase of Pasha's 50% ownership interest in the JV was memorialized in the November 5, 2010 Purchase Agreement. (Exhibit 3.) The transfer by Jansheski of 24.5% of his ownership interest in the JV to Pasha was memorialized in a separate November 5, 2010 Transfer Agreement. (Exhibit 4.) Both the Purchase and Transfer Agreements were signed at the same time.

The DenTek Transaction closed in or about December 2010. Pursuant to the Purchase Agreement, Jansheski purchased Pasha's 50% ownership interest for $8 million. Jansheski did not transfer 24.5% of the JV to Pasha claiming that an amended or replacement joint venture agreement had yet been agree upon. Jansheski did not submit to arbitration any dispute as to the terms of an amended or replacement agreement as required by the Transfer Agreement. At the arbitration hearing, Jansheski claimed there was a "sticking point" that had prevented an amended or replacement joint venture agreement from being signed. Jansheski retained 50% of the shares of the JV and, despite agreeing to do so, never transferred 24.5% of the total outstanding shares to Pasha. Prior to the arbitration hearing, Jansheski transferred his 50% ownership interest in the JV to Starboard International, LLC ("Starboard"), which includes the 24.5% to be provided to Pasha.

On August 17, 2012, Jansheski commenced the arbitration with the filing of his Demand for Arbitration against Pasha and Passion. (Exhibit 5.) On or about August 27, 2012, Pasha filed his Statement of Defenses to the arbitration (Exhibit 6) and a Counterclaim against Jansheski

(Exhibit 7). Pasha sought damages and an order that Jansheski deliver, *inter alia,* the shares representing 24.5% of the JV to Pasha.

The parties agreed to arbitrate,

> "any dispute, claim or controversy arising out of or relating to this Agreement [the Purchase and Transfer Agreements] or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration in the State of New York before one arbitrator. The arbitration shall be administered by JAMS . . . pursuant to its Streamlined Rules and Procedures. Judgment on any award may be entered in any court having jurisdiction. . . ." (Exhibits 3 and 4.)

An arbitration hearing was held, lasting three full days, beginning on May 15, 2013 and concluding on May 17, 2013, at which point the record was closed and closing briefs were submitted. The arbitration hearing was reopened for two full days on October 2 and 3, 2013, to permit further cross-examination of Pasha following a request from Jansheski. (Order No. 3, Exhibit 9.) The Arbitrator did not indicate at any time that he was missing or needed any evidence in order to render an award.

On or about November 1, 2013, the Final Award was issued. (Exhibit 1.)

III. THE ARBITRATOR FOUND IN FAVOR OF PASHA, BUT FAILED TO AWARD PASHA ANY DAMAGES FOR JANSHESKI'S FAILURE TO TRANSFER 24.5% OF THE SHARES OF THE JV OR TO AWARD SPECIFIC PERFORMANCE OF THE TRANSFER.

The Arbitrator ruled against Jansheski on the entirety of his Claim and made the following pertinent findings and rulings in the Final Award:

> (a) "The claims [by Jansheski] to recover damages for breach of fiduciary duty, and fraud and misrepresentation, on the basis of alleged false financials are without merit . . . . The claims to recover damages for aiding and abetting breach of fiduciary duty, and aiding and abetting fraud and misrepresentation, predicated on this same conduct, are also without merit." (Exhibit 1, Final Award, pp. 17-18.)

(b) ". . . the claims [by Jansheski] to recover damages for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, misrepresentation and fraud, aiding and abetting misrepresentation and fraud, and breach of the implied covenant of good faith and fair dealing, based upon the alleged falsification of the JV financials are without merit and these claims are severed and dismissed." (Final Award, p. 19.)

(c) Jansheski agreed to Pasha's price of $8 million because Jansheski was, "going to get the deal closed pretty much any way that [he] could. ***The Claimant [Jansheski] is a sophisticated businessman who was not forced to pay Pasha $8 million and give him a 24.5% interest in the joint venture, but rather agreed to such terms in order to close a much larger deal that was driving this transaction.***" [Emphasis added.] (Final Award, p. 23.)

(d) Jansheski failed to prove that he was deprived of the benefit of the bargain under the JV Agreement [Purchase Agreement] on the basis of his negotiation. Jansheski agreed to pay Pasha more than what his share of the JV interests may have been worth under Jansheski 's interpretation of Section 12.6. (Final Award, p. 23.)

(e) ". . . [Jansheski's] claims to recover damages for breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing on the ground that Pasha refused to abide by Section 12.6 of the JV Agreement, and caused the Claimant to pay more than 'was fair' for his shares of the joint venture are without merit, and those claims are severed and dismissed." (Final Award, p. 23.)

(f) With regard to Jansheski's claim that unequal management fees had been paid by Pasha and Passion and that Jansheski had been underpaid, Jansheski, "failed to establish that Pasha paid Passion more than its share of management fees, and that Jansheski failed to establish, by a preponderance of the evidence, that Pasha breached his fiduciary duty by paying unequal management fees or that he engaged in fraud or falsely represented that each party was receiving equal management fees when they in fact were not." Jansheski's "claims to recover damages for breach of fiduciary duty, misrepresentation and fraud, and breach of the implied covenant of good faith and fair dealing on the basis of the failure to pay equal management fees, are without merit." (Final Award, p. 26.)

(g) Jansheski's claims against Passion for aiding and abetting each of the foregoing were without merit and were severed and dismissed. (Final Award, p. 27.)

(h) On Jansheski's claim of unjust enrichment by Pasha for having paid Pasha $8 million for his interest in the joint venture when it was worth allegedly only $528,819, Jansheski, "failed to establish the claims on which the unjust

> enrichment is predicated, and that he has not proven that he had suffered damages" as a result of paying Pasha $8 million. Jansheski's claims to recover damages under the unjust enrichment theory were denied, severed and dismissed. (Final Award, p. 28.)

On Jansheski's defenses to Pasha's Counterclaim, the Arbitrator ruled against Jansheski in pertinent part as follows:

> (a) With respect to the Transfer Agreement and the Purchase Agreement, each dated November 5, 2010, the Arbitrator held that under Delaware law, contracts executed at the same time and relating to the same transaction can be construed as a single document, and thus the Purchase Agreement and the Transfer Agreement are part of a unified contract. (Final Award, pp. 34-35.)
>
> (b) It is undisputed that after a telephone call on October 27, 2010, the parties did not execute a written agreement, but rather negotiations continued on November 3, 2010, and the agreement to transfer to Pasha a 24.5% interest in the "new joint venture" became part and parcel of the agreement for Pasha to sell his shares in the joint venture. (Exhibit 1, p. 35.)
>
> (c) The sale of Pasha's shares for $8 million and the transfer to Pasha of 24.5% of the "new joint venture" are part of the same transaction. (Final Award, p. 35.)
>
> (d) As a matter of law, the Purchase Agreement and the Transfer Agreement are construed together as a single contract, and that Jansheski's contention that the Transfer Agreement should be set aside for lack of consideration is without merit. (Final Award, pp. 35-36.)
>
> (e) Jansheski's defense that he executed the Transfer Agreement "under duress" and that it should be set aside on public policy grounds lacked merit. (Final Award, p. 36.)
>
> (f) Jansheski "is a sophisticated business person who has operated his own business for many years." The Arbitrator further found that Jansheski's testimony, "establishes that he was willing to go to great lengths to close the deal with TSG." (Final Award, p. 36.)
>
> (g) "Although the Arbitrator concludes that, based on the credible testimony, that ***Pasha did, indeed, take advantage of the pressure placed upon the Claimant by TSG, there is no evidence to establish that Pasha committed any 'wrongful act' or that the Claimant did not have ample means to protect himself. Thus, the defense of duress is without merit.*** " [Emphasis added.] (Final Award, p. 36.)

After finding that the Transfer Agreement was valid and that there was no defense to its enforcement, on Pasha's Counterclaim, the Arbitrator ruled that there was absolutely no evidence or testimony of damages or the amount of damages and therefore none would be awarded. The Arbitrator denied Pasha's claim for specific performance of the Transfer Agreement. The pertinent findings and rulings are as follows:

> (a) On Pasha's Counterclaim for breach of the Transfer Agreement, the Arbitrator found that, "Pasha presented absolutely no evidence or testimony of damages at the hearing. Thus, Pasha has failed to establish, by a preponderance of the evidence, the existence or amount of damages suffered as a result of the Claimant's failure to abide by the 2010 Transfer Agreement." (Final Award, p. 38.)
>
> (b) On Pasha's Counterclaim for specific performance of the Transfer Agreement, "Pasha never would commit to a number, dragging the negotiations on and, in the process, driving up the price for his shares. Pasha's testimony revealed that he was worried for his livelihood. . . . ***Pasha was thus motivated to obtain the best deal for himself, and was acutely aware of the Claimant's [Jansheski] need to purchase his 50% share of the joint venture in order to close the TSG deal. Pasha used the pressure placed on the Claimant by TSG to his greatest advantage. Although his conduct did not rise to the level of a breach of fiduciary duty, it nevertheless was inequitable and cannot be rewarded with equitable relief.*** Therefore, Pasha's counterclaim for specific performance is denied and it is severed and dismissed. [Emphasis added.] (Final Award, pp. 39-40.)

IV. THE ARBITRATION AWARD SHOULD BE VACATED AND/OR REMANDED AS TO THE AMOUNT OF DAMAGES FOR THE BREACH OF TRANSFER AGREEMENT AND SPECIFIC PERFORMANCE CLAIMS.

A. The FAA Must Be Applied In Deciding This Petition.

Article V(1)(e) of the New York Convention allows a court in a country under whose law the arbitration was conducted to apply domestic arbitral law, in this case, the FAA (9 U.S.C.§ 1, *et seq.*) to a motion to set aside or vacate that arbitral award. (*Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997); *Phoenix Bulk Carriers, Ltd. v. Am. Metals Trading, LLP,* 2013 U.S. Dist. LEXIS 156683 at *9 (S.D.N.Y. 2013).)

Pasha petitions the Court to vacate and/or remand the determination of the amount of damages and decision on specific performance pertaining to the Transfer Agreement pursuant to § 10(a)(3) and (4) of the FAA, which provide as follows:

> "(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or ***in refusing to hear evidence pertinent and material to the controversy***; or of any other behavior by which the rights of any party have been prejudiced; or
>
> (4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." [Emphasis added.]

The FAA creates a federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act. (*PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1998 (2d Cir. 1996) (*citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).)

B. The Final Award Does Not Specify Any Amount Of Damages For The Breach Of The Transfer Agreement Even Though There Was Ample Evidence That The Shares Had Value And That There Were Substantial Damages.

The Transfer Agreement required that Jansheski transfer 24.5% of the shares in the JV to Pasha. The 24.5% ownership interest in the JV is the same JV that Jansheski paid $8 million to Pasha for 50% of the shares. The shares that were not provided to Pasha were the same shares that Pasha had sold to Jansheski. While an amended or replacement joint venture agreement may change certain dynamics of the operation and control of the JV, the only evidence at the arbitration was from Jansheski that he and TSG had yet to agree to all of the terms of an amended or replacement joint venture agreement. (Exhibit 13, Transcript 802:16-804:15.) Accordingly, the existing joint venture agreement is still in place. Either way, there was no evidence that the value of the JV had decreased from when 50% of the shares sold for $8 million.

In fact, the evidence was to the contrary that the JV was increasing its business and thus value. Certainly, the shares were worth more than the nothing that was awarded to Pasha. Based on the $8 million that Jansheski paid for 50% of the JV at the end of 2010, 24.5% of the JV would have a value of $3.92 million.

The Arbitrator found that,

> "Pasha presented absolutely no evidence or testimony or damages at the hearing. Thus, Pasha has failed to establish, by a preponderance of the evidence, the existence or amount of damages suffered as a result of the Claimant's failure to abide by the 2010 Transfer Agreement." (Final Award, Exhibit 1, p. 38.)

Since one of the elements of a breach of contract under Delaware law (the governing law of the Transfer Agreement) is "resulting damage to the plaintiff" (*Greenstar, LLC v. Heller*, 814 F.Supp.2d 444, 450 (D. Del. 2011), the Arbitrator presumably found that Jansheski's failure to provide the promised shares did not result in any damage to Pasha. With all due respect, this is completely nonsensical since damages of some amount are self-evident for the loss of the 24.5% of the JV. As will be seen, the Arbitrator also had to refuse to hear the voluminous evidence in the record on damages in making this finding.

Pasha had asked the Arbitrator to order specific performance of the transfer of 24.5% ownership interest in lieu of money damages for the shares. Also, Pasha at the time of the hearing was no longer involved with the operations of the JV and was not yet a shareholder. Pasha had no access for the arbitration hearing to the current financials and operations of the JV. However, there was both documentary evidence and testimony on the existence and amount of damages received in evidence at the arbitration hearing. Since this is such an important issue, this Memorandum will set forth at this point the evidence on the existence of damages and amount of damages received at the hearing.

First, there could be no valid belief that it was even possible that the shares in the JV had no value whatsoever. The shares obviously had a substantial value since in November 2010 Jansheski paid $8 million for 50% of the shares of the JV. There was no evidence that the JV was not in existence or had sold its intellectual property, which was all of the rights to the DenTek products in the UK, Europe, the Middle East, Russia Japan and Kenya. TSG paid $110 million for the shares of DenTek and for a 50% interest of the JV. It is self-evident that there were actual damages resulting from Pasha not receiving 24.5% of the shares of the JV.

Second, there was ample evidence at the hearing as to the value of the JV, including that 50% of the shares of the JV had sold for $8 million in late 2010 (rendering 24.5% of the shares with a value of $3.92 million). For example, Pasha testified that there was a range under Section 12.6(f) of the JV Agreement at which the JV could be valued. From this valuation, the Arbitrator could, applying simple arithmetic, compute the monetary value of the 24.5% of the JV that Pasha was to have received from Jansheski under the Transfer Agreement. Pasha testified in response to questions by the Arbitrator as to the value of the JV and his damages by not receiving 24.5% of the shares:

> "THE ARBITRATOR: What was the range?
>
> "DR. PASHA: The range was from 6 million all the way up to 30 million.
>
> "THE ARBITRATOR: Did you express that?
>
> "DR. PASHA: Oh, yes, I did. So in my mind, it was somewhere between six as a minimum, two times three, and somewhere between two times 15, which is 30. He said, what about eight? What about eight? I said JJ [Jansheski], we put all these years into it. I'm not practicing medicine. This is actually my livelihood. And it's the truth, because when Passion 4 Health started doing this, we were selling other products, and we were doing other things. But as time went on, this began to be the focus of the company, Then we talked about doing Europe and the world and the Middle East. We were going to be building us a $200 million -- his words, not mine. So as time progressed, the ethics of the company became just Dentek. All our packing,

all our shipping, everything was Dentek, Dentek, Dentek. You asked a question. So I thought it was a range. It's not going to be enough. There's a lot of commitment I have to fill. We now have an empty warehouse at that stage. We have to pick up the pieces. What about my staff? What are they going to do? I put bread on their table, because they're selling Dentek stuff. So now what, they're going to go home unemployed? They're going to start all over again?" (Exhibit 13, Transcript, 276:18-280:7.)

Jansheski testified that as of late 2010, the cumulative gross sales of the JV for its five (5) years in business were between $15 to 16 million. When multiplied by two to get the Gross Sales Multiplier (for purposes of the Section 12.6 buyout provision in the JV Agreement), that would be $30 million to $32 million as testified to by Pasha. In this regard, Jansheski's testimony was as follows:

"THE ARBITRATOR: How many years worth of gross sales –

"MR. NEWMAN: -- sales of the JV were there at the time of the buy-out.

"A. At the time of the buy-out, the JV had been in existence for five years.

"Q. And during -- isn't it true, sir, that during that five years there were gross sales in each year of the JV?

"A. Is it true, sir, that in November of 2010, that the gross sales of the JV at the time of the buy-out were between 15 and $16 million, probably in excess of $16 million?

"A. The cumulative, yes.

"Q. And two times 15 to $16 million would put them in the 30 million-dollar range; is that correct, sir?

"A. That's the math you're using. . . .

"Q. $3 million gross sales every year for five years, correct?

"A. Average. Average.

"Q. Average. Five times three, sir, is 15, correct?

"A. Five times three is 15, correct.

"Q. Times two is 30.

"A. Times two is 30." (Exhibit 13, Transcript, 613:12-622:19.)

When Pasha was cross-examined, Jansheski's counsel asked, "Dr. Pasha, do you have any basis for the claim of $25 million in damages, yes or no?" Here again, Pasha testified as to how he arrived at that amount for the damages he had incurred since he had been the manager of the JV. In fact, the Arbitrator specifically noted that Pasha said he had a basis for the damages. The testimony is as follows:

> "Q. Dr. Pasha, do you have any basis for the claim of $25 million in damages; yes or no?
>
> "THE ARBITRATOR: He said he has.
>
> "Q. Okay. What is your basis?
>
> "THE WITNESS: Can I answer that?
>
> "THE ARBITRATOR: Yes.
>
> "MR. NEWMAN: He's asked you.
>
> "A. Yes. The -- the clause in the agreement, in the original JV agreement, the clause speaks for itself. It had a range. We talked about it before. The range went from our interpretation, which was like an eight, all the way up to like two times fifteen, which is 30 million.
>
> "Q. And so --
>
> "A. And then -- Hold on. You asked me. And so we got eight. We haven't even been given the shares yet, and so basically, you know, you subtract from 20, you know, whatever it was, 30 minus eight, you get whatever you get.
>
> "MR. NEWMAN:
>
> "A. (Continuing) 22. And then we've all the other bits and pieces that we've -- that we've missed out on.

"Q. Okay. And number two, you believe that there are profits of the JV that have not been paid to you.

"A. Absolutely." (Exhibit 13, Transcript, 1125:24-127:19.)

On May 16, 2013, the Arbitrator admitted into evidence Claimant's Exhibits 30-34, which were the written financial statements of the JV for the years 2006 through 2010. (Exhibit 13, Transcript, 457:17-460:2 and 468:1-3; Exhibit 10.) These financial statements were evidence that the JV had value and accordingly 24.5% of its shares had value. Jansheski's breach of the Transfer Agreement obviously resulted in substantial damages to Pasha.

Among other things, the JV's financial statements show the "turnover" or gross sales of the JV for each of the five (5) years of its existence. They confirmed Pasha and Jansheski's testimony that on average the gross sales were $3 million per year, and over the five-year existence of the JV, the gross sales were between $15 to 16 million.

Pasha also explained in his testimony the value of the JV and why that value could increase because sales of the JV could easily become $120 to130 million:

"Q. Before we took our short recess, urgent recess, his Honor asked you a question about the value of what you thought the value was of the JV, and you started to give him your reasons why.

"A. Yes.

"Q. Had you completed your answer on that?

"A. No. So we had gone into five or six other countries, and that's the reason we maintained the sales level despite the fact that we'd lost a lot of --

"THE ARBITRATOR: -- Boots. [Largest UK chain of pharmacies.]

"THE WITNESS: Yes. -- and because we had also brought on five of the other major retailers in England, which is pretty much the biggest game in town now, and we had everybody, we had the lot, and so that's where we were with the U.K. I think we're pretty much at capacity. And so other growth will come as the recession improves. But that was another thing to contend with.

The category in Boots, the sales have gone down overall, but we maintained a very good level because the hard work of my staff, because –

"THE ARBITRATOR: But back in 2010 wasn't the value of the JV a function of its history in succeeding in the marketplace?

"THE WITNESS: Absolutely, your Honor.

"THE ARBITRATOR: So my question is in the context of that period of time, whether you thought eight million plus 24 and a half percent of the new entity was a fair price for your half interest.

"THE WITNESS: Yes, I did, your Honor. Yes, I did, I think it was a fair price. And I also think that taking everything into consideration, the contract or the joint venture that we had, the clause that we had, and could -- should I have got a better price?

"THE WITNESS: Could it be worth more? Maybe. I know that the JV is quite a golden nugget, everyone's after it. And then why? Because they know it owns the intellectual property. They know it owns so much territory. But, you know, the JV has immense value. (Unintelligible) --

"THE ARBITRATOR: Okay.

"THE WITNESS: As -- per those markets were penetrated, as the sales grow, the sales could easily, easily become a hundred and twenty, a hundred and thirty million dollars. We often talked about it.

"THE ARBITRATOR: Okay." (Exhibit 13, Transcript, 978:22-984:15.)

The Arbitrator also elicited testimony from Pasha focusing on the value of the JV and why Pasha believed that $8 million plus 24.5% of its shares was a fair price for his 50% interest in the JV:

"THE ARBITRATOR: Focusing on the value of the JV --

"THE WITNESS: Yes.

"THE ARBITRATOR: -- in terms of both its historical earnings and its then present value, do you think eight million plus 24 and a half percent of the new entity was a fair price for your half interest?

"THE WITNESS: Your Honor, what I know is that the advice -- the advice that I'd been given, and my own understanding of that, and the value

that contract gives, because the JV, I know what it's going to grow to, John knows what it's going to grow to; it's got huge value. It owns Dentek as a brand in all of Europe. In all of that, in all of the -- the future potential, it's the whole of the Middle East. It's Japan. It's Germany. It's Belgium. It's France. I mean these are all countries we were laying foundation in. The JV, it owns the international [sic] [intellectual property], your Honor. It's Dentek.

"THE ARBITRATOR: Had you made inroads into those other markets?

"THE WITNESS: Yes, your Honor, we had. We are selling, your Honor, into Germany. We were selling, your Honor, into France. Our growth that everyone criticizes us for, the reason was twofold. The reason was twofold. Number one, we had -- threefold. Number one, our biggest customer, your Honor, had decided to do copycat product, Boots. When they saw this product was so successful, they private-labeled the product under their own Boots brand. They private-labeled the product under their own Boots brand. They did, so our sales plummeted.

"THE WITNESS: So we had to contend with that big obstacle where our biggest customer private labeled the product. But we still maintained the sales. We brought on loads of new customers since the JV -- since was a distribution agreement. We brought on, your Honor, Tesco, Asda. We bought on Tesco. We brought on Asda. There are only, your Honor, a handful of big chains in England. It's not like the U.S. It's not a vast country. We're about 10 percent of that. We have -- I can tell you our biggest customers: Boots, SuperDrug, Tesco, Asda, Sainsbury's, Morrison's and Lloyd's Pharmacies. That's pretty much it. And before the joint venture, we had Boots and one other, and we brought on the other five biggest chains in the country since the joint venture came on board." (Exhibit 13, Transcript, 970:20-973:19.

The Arbitrator had to find that the shares of the JV had a value and could easily have determined damages based on the above testimony and the fact that the 24.5% shares had a value of $3.92 million in late 2010 based on the price of the sale under the Purchase Agreement. But the Arbitrator also received the testimony of two witnesses called by Jansheski on the value of the shares of the JV.

The Arbitrator heard the testimony of Julian Steinberg, an investment banker who had consulted with Jansheski on his sale of DenTek and 50% of the JV to TSG for $110 million. Although Pasha disputed Steinberg's valuation, Steinberg did provide testimony on the value of

the JV and its shares. In Steinberg's calculation, the value of the JV would be calculated using $3 million (one year's gross earnings of the JV) times two, or $6 million. Twenty-four point five percent of $6 million could have been easily calculated by the Arbitrator to be $1.47 million. Steinberg testified in part as follows:

> "Q. Okay. And as an investment banker, did you have an opinion as to what you felt the joint venture should have been valued at?
>
> "A. Yes.
>
> "A. The joint venture should have been valued at what the company was valued at, so really a multiple EBITDA, which you can translate into a multiple of net sales. The company, Dentek, was sold for about two times net sales or, said another way, around eight times EBITDA. The JV, we believe, had an EBITDA of somewhere in neighborhood of six or seven thousand dollars, which would put the value of the business number between, call it, four and a half to five and a half million dollars, which coincidentally was around two times net sales of the JV. The gross sales of the JV was somewhere in the neighborhood of three million bucks at the time. So based on the way the contract was written, $6 million was the buy-out price for 100 percent of the JV, which was a little bit more expensive than what it was, but we thought it was a fair price. So what we thought John's buy-out of the 50 percent that he didn't own of the JV would be was $3 million.
>
> "THE ARBITRATOR: You mentioned gross sales, and you said $3 million. Is that an annual gross sales?
>
> "THE WITNESS: Annual gross sales." (Exhibit 13, Transcript, 718:12-721:8.)

The Arbitrator also heard the testimony of Daniel Doran, a valuation expert for Jansheski. Doran testified that the value of 50% of the JV was $528,819 in late 2010 and his valuation report was admitted into evidence (Claimant's Exhibit 11). While Pasha does not agree with this valuation, it was evidence in the record as to the value of the JV, that Pasha incurred damages when he was not provided a 24.5% interest in the JV, and a value from which to calculate the amount of damages. (Exhibit 13, Transcript, 468:5-469:24, 478.)

Doran also acknowledged that he did not include the value of the JV's intellectual property when making his valuation, and that if he had, the JV would "potentially" have been worth far more. (Exhibit 13, Transcript, p. 526:11-13.) Both Pasha and Jansheski testified that the JV owned the intellectual property for the region covered by the JV, which was the UK, Europe, the Middle East, Russia, Japan and Kenya. (Exhibit 13, Transcript, pp. 261, 759 760 and 790.)

There was also evidence of additional damages incurred by Pasha flowing from the breach of the Transfer Agreement. While Pasha had asked for the shares to be provided to him with an accounting of profits for the time period he was deprived the shares, there was evidence at the arbitration hearing of lost profits and efforts by the JV to prevent Pasha from being able to receive these profits. The Arbitrator received in evidence as Respondent's Exhibit 78 a series of emails. (Exhibit 12, Respondent's Exhibit 78.) This series of emails showed a conspiracy among Jansheski and others at DenTek to prevent Pasha from sharing in the profits of the JV after it was sold to TSG. For example, on May 13, 2011, Jansheski was advised that counsel and others agreed that 50% of the interim profits in the JV belonged to him and that the issue was how to keep (Pasha) from getting those profits. (Exhibit 12; Exhibit 13, Transcript, 807:18-808:11.)

Another email, included in Respondent's Exhibit 78, was among Jansheski and his advisors, which noted that,

> ". . . when Pasha signs the Transfer Agreement and receives his 24.5% of the shares, ***he will be entitled to his pro rata share of all the corporate assets or proceeds which effectively means he does share in the interim profits of the JV from December 18, 2010 to the date of the new JV Agreement.***" [Emphasis added.] (Exhibit 13, Transcript, 819:1-820:9, 825:18- 21.)

Based on the Transfer Agreement, the emails and Jansheski's testimony, there is little doubt that Pasha would have participated in the net profits of the JV had he received his 24.5% interest therein. Based on the foregoing, there was evidence and testimony before the Arbitrator on which he could order damages be paid or, as Pasha otherwise requested in his Counterclaim, an accounting to determine the amount.

Pasha also testified that because he had not received the 24.5% interest or his share of the JV's profits, that his business, Passion, had suffered dramatically and that he personally was paying the salaries of his staff and for the facilities of Passion. (Exhibit 13, Transcript, 1111:1-1112:2.)

Even though Pasha had no ability in an arbitration to present hard evidence of the value of the JV since late 2010, there was substantial evidence of the value of the JV and its shares without any evidence that the JV had decreased or ceased its operations and had sold its intellectual property and other assets. There was also evidence that Jansheski's advisors confirmed that Pasha was to have received his 24.5% of the profits that went with the shares. Pasha had requested that the Arbitrator award Pasha the shares and order specific performance of the Transfer Agreement and an accounting of the profits.

The Arbitrator's total failure to provide any amount of damages and decision not to require specific performance or an accounting render the Final Award subject to being vacated and/or remanded on these narrow issues as explained hereafter.

C. The Arbitrator Has Imposed His Own Notions Of Substantial Justice Refusing To Award Damages To Pasha For Breach Of Contract.

The U.S. Supreme Court, in *Oxford Health Plans LLC v. Sutter,* 133 S.Ct. 2064 (2013), acknowledged that to have an award vacated, it is not enough to show that the arbitrator committed an error, because the parties bargained for the arbitrator's construction of their

agreement. However, a court is free to vacate or overturn an arbitration award when an arbitrator "'act[s] outside of the scope of his contractually delegated authority' – issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract' . . . ." (*Id.* at p. 2068.)

In the matter at bench, the Arbitrator has imposed his own notions of economic justice in failing to award any damages to Pasha for Jansheski's breach of the Transfer Agreement and at the same time denying Pasha specific performance of the Transfer Agreement and an accounting.

The Arbitrator heard extensive testimony about damages, including the monetary value of 24.5% of the JV. There was an entire range of value attributable to the JV, including the explanation of how those amounts were arrived upon by Pasha and others. Jansheski provided his valuations of the JV by a valuation expert and an investment banker, however, those valuations were not, as found by the Arbitrator, within the valuation method called for in the JV Agreement. Pasha testified that such damages would be $25 million; the $30 million value of the JV less the $8 million already paid to him by Jansheski, plus ancillary damages, *e.g.*, lost profits.

The Arbitrator also ignored the basic law of damages on contracts in Delaware. "The proper measure of damages for breach of contract is 'based upon the reasonable expectations of the parties *ex ante*.'" (*WaveDivision Holdings, LLC v. Millennium Digital Media Systems, LLC*, 2010 Del. Ch. LEXIS 194, at *65-66 (Del. Ch. Sept. 17, 2010).) After the Arbitrator found that the Transfer Agreement was valid and ruled against Jansheski's defenses, the Arbitrator should have put Pasha in "as good a position" as he would have been had Jansheski not breached. (*Ibid.*) Significantly, the damages suffered by Pasha are to be measured from his perspective "based upon the value of the bargained for agreements" to Pasha and "***should be measured at***

the time of the breach."[2] (*Id.* at *65.) The Chancery court also noted that this is consistent with 24 WILLISTON ON CONTRACTS § 64:2 "(reasoning that 'basing damages on an amount equal to what the promisor, and ***especially, the promissee***, believed the promise to be worth, reflects better than any other measure the loss caused by the breach. . . . ." [Emphasis in original.] (*Id.* at *66.)

There can be no bona fide question that Pasha's failure to receive 24.5% of the shares of the JV caused him damage, both in the value of the shares he did not receive, lost profits and other damages testified to by Pasha. The damages cannot be found not to exist even if they were for argument sake just nominal damages. The Arbitrator acted outside of his contractually delegated authority by disregarding the terms of the Transfer Agreement after he found it to be enforceable and by ignoring the facts and law. Rather than awarding damages on the Transfer Agreement, having found that the other elements of breach of contract had been met, the Arbitrator has, in imposing his own "notions of economic justice" decided that Pasha should receive nothing – not money damages or specific performance of the Transfer Agreement – as had been agreed to by Jansheski.

D. The Failure To Award A Specific Amount Of Damages Did Not Finally Resolve All Issues Submitted To Arbitration And Will Result In Further Litigation To Finalize The Obligations Of The Parties.

In order for an arbitration award to be "a mutual, final, and definite award" under § 10(a)(4) of the FAA, it must "resolve all issues submitted to arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties." (*Conntech Dev. Co. v. University of Conn. Educ. Props.,* 102 F. 3d 677, 686 (2d Cir. 1996).)

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[2] Since the Transfer Agreement contemplated that the shares in the JV would be transferred to Pasha within approximately 180 days of November 5, 2010 (Jansheski was required to arbitrate with TSG any points if an amended or replacement joint venture agreement was not reached), the evidence of the value of the JV as of approximately November 2010 is particularly relevant for determining the value of the shares of JV promised to be transferred to Pasha.

The issue of the breach of the Transfer Agreement was not fully determined since the Final Award ultimately leaves open the issue of Jansheski's failure to transfer the shares to Pasha. The Arbitrator must determine from the evidence or ask for such evidence (which he did not do) of the damages, if any, resulting from the breach of the Transfer Agreement. Clearly this did not occur.

In *Coca-Cola Bottling Co. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers, Local Union No. 991*, 506 F.Supp.2d 1052, 1060-1061 (S.D. Ala. 2007), the court addressed a similar issue, an award that found liability but then did not award any damages since the arbitrator found that he lacked sufficient information to fix the amount of damages from the existing record. The Eleventh Circuit remanded the case to the district court with instructions to determine the appropriate procedure for resolving the damages issue. The district court then treated the arbitration award as "ambiguous or incomplete, because it settles the question of liability while leaving the calculation of the amount of the make-whole remedy to the parties, ..." The court then remanded the action to the arbitrator to clarify the award on this narrow point expressly leaving the arbitrator free "to reopen the arbitral record, hear additional evidence, and make additional findings of fact as necessary to compute the make-whole remedy." (*Id.* at p. 1061.)

Under somewhat similar circumstances, in Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co., 990 F.Supp. 304, 311 (S.D.N.Y. 1998), the court refused to confirm an arbitration award "because it does not specify the amount of damages." The court found that as a result the arbitration panel "did not render a 'mutual, final, and definite award.' 9 U.S.C. § 10(a)(4)."

Similarly, in *Cofinco, Inc. v. Bakrie & Bros., N. V.*, 395 F.Supp. 613 (S.D.N.Y. 1975), the court vacated an arbitration award finding:

> "The goal of the proceeding was, and remains, a money award. ***It is not sufficient to leave open matters like 'accrued expenses,' interest, and the like, which could entail large sums and disagreements confided to the arbitral jurisdiction. Unless items like these are handled by agreement of the parties, the arbitrators should hear them, taking relevant evidence as needed, and decide them, not leave them for decision somewhere else or at some other time.***" [Emphasis added.] (*Id.,* p. 616.)

In addition, under the Transfer Agreement, Jansheski was not to transfer the 24.5% of the shares until after certain conditions occurred, including until an amended or replacement joint venture agreement was worked out with TSG. It was also undisputed that such an amended or replacement agreement was not yet worked out and that Jansheski had failed to initiate the arbitration to resolve the issues that remained on such a new agreement as required by the Transfer Agreement. Pasha argued that in light of Jansheski not pursuing the required arbitration with TSG to resolve any issues with respect to an amended or replacement agreement, the conditions were effectively waived. But, these issues were not resolved by the Arbitrator. When in the future Jansheski and TSG sign an amended or replacement joint venture agreement for the JV, then Pasha's right to the 24.5% of the shares will mature under the contract. The Arbitrator is required to resolve all disputes between the parties as to the Transfer Agreement. The Arbitrator failed to do so since what may happen next is unclear and the issue was not fully resolved.

In *Olympia & York Fla. Equity Corp. v. Gould*, 776 F.2d 42, 45 (2d Cir. 1985), the court held that an award was ambiguous when the award "failed to deal explicitly with the contingency which arose" in a transaction where a party exercised an option to purchase but could not close the purchase. The Second Circuit found that this created an ambiguity in the award and was "sufficient evidence of lack of a 'mutual, final and definite award'" to warrant a remand to the

arbitrators to "enable them to state what their true intention was" in the event the party electing to purchase should thereafter default.

While Jansheski may argue that the Arbitrator did specify an amount of damages, none, clearly the Arbitrator did not ultimately reach such a determination. The Arbitrator instead found that there was no evidence of the existence of damages or the amount, which clearly cannot be the case and was not the case. Either way, in light of the fact that Pasha may yet be able to claim a breach of the Transfer Agreement once the condition of an amended or replacement joint venture agreement takes place, the Arbitrator did not reach the essence of this dispute and did not determine the issue so that no further litigation is necessary to finalize the obligations of the parties. The Arbitrator's decision not to require specific performance of the Transfer Agreement only compounds his failure to award any amount of damages for the breach of the Transfer Agreement.

E. The Final Award Manifestly Disregarded The Law In Finding That It Would Not Require Specific Performance Of The Contract To Provide 24.5% Of The Shares In A Joint Venture After Finding That While There Was A Breach Of Contract To Provide Such Shares No Damages Of Any Amount Would Be Awarded.

1. An arbitration award can be vacated on the grounds of manifest disregard in the Second Circuit.

As "judicial gloss" on the "specific grounds for vacatur" provided in the FAA, the Second Circuit has held that a court may set aside an arbitration award if it was rendered in "manifest disregard of the law." (*Schwartz v. Merrill Lynch & Co. Inc.*, 665 F.3d 444, 451 (2d Cir. 2011); *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010); see also *Sotheby's Int'l Realty, Inc. v. Relocation Group, LLC*, 2013 U.S. Dist. LEXIS 180040 at *10 (D. Conn., Dec. 5, 2013).)

The Second Circuit has identified a three-step inquiry as to whether an arbitration award should be vacated on the grounds of manifest disregard:

> "First, we must consider whether the law that was allegedly ignored was clear and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.
>
> "Second, we must find that the law was in fact improperly applied, leading to an erroneous outcome . . . even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts from the case.
>
> "Third, we look to a subjective element that is the knowledge actually possessed by the arbitrator. In order to intentionally disregard the law, the arbitrator must have known of its existence and its applicability to the problem before him." (*T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, *supra,* 592 F.3d at 339.)

Manifest disregard of the law may be found if the arbitrator "understood and correctly stated the law, but proceeded to ignore it." (*Bell Aerospace Co. Div. of Textron, Inc. v. International Union, etc.*, 356 F.Supp. 354, 356 (W.D.N.Y. 1973), rev'd on other grounds, 500 F.2d 921 (2d Cir. 1974); see also *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972).)

If there is to be any meaningful traditional review, an arbitrator's award should not be absolutely immune from scrutiny. Courts on occasion should be able to remand awards to arbitrators to clarify their meaning or effect of an award or to determine whether the arbitrator has in some way exceeded his powers. (See *Siegal v. Titan Industrial Corp.*, 779 F.2d 891, 894 (2d Cir. 1985).) The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal

principle, but decides to ignore or pay no attention to it. (*DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997).)

When an arbitrator strays from interpretation and obligation of the agreement and "effectively dispenses his own brand of industrial justice," his decision may be unenforceable. (*Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1767 (2010).)

To apply the manifest disregard standard, the court must first consider whether the governing law alleged to have been ignored was well defined, explicit and clearly applicable and second whether the arbitrator knew of the existence of a clearly governing principle, but decided to ignore it or pay no attention to it. (*Jock v. Sterling Jewelers Inc.*, 646 F. 3d 113, 121, n.1 (2d Cir., 2011).) Knowledge of the governing law on the part of an arbitrator is not to be assumed; rather, the Second Circuit has observed that the party seeking vacatur of an arbitral award must "communicate – either by written submission or orally – to the arbitrator what the governing law is in his favor." (*DiRussa v. Dean Witter Reynolds, Inc., supra,* 121 F.3d at 823 (2d Cir. 1997).)

2. The Arbitrator manifestly disregarded basic contract law regarding damages.

The Arbitrator was provided with the applicable law. The Arbitrator states the applicable Delaware law for breach of contract at page 38 of the Final Award. The only basis for denying Pasha's claim for breach of the Transfer Agreement was the alleged failure of Pasha to provide any evidence of damages or the amount of damages. Otherwise, Pasha had established the elements of a breach of contract, but for the Arbitrator's view that the element of "resulting damages" from the breach was not established.

Clearly the Final Award is not supported by the undisputed evidence at the hearing, which is that Jansheski has yet to transfer 24.5% of the shares of the JV to Pasha. This failure to perform by Jansheski caused damages, even if in a nominal amount (which was not the case). In

Collins & Aikman Floor Coverings Corp. v. Froehlich, 736 F.Supp. 480, 487 (S.D.N.Y. 1990), the court held that ***"when the proof submitted at the hearing does not support the award, it should be set aside.*** See, e.g., *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649,651 (5th Cir. 1979) (award vacated where arbitration panel awarded unrequested amount of damages three times larger than any item claimed)." [Emphasis added.]

Awarding no damages for the breach of the Transfer Agreement is not rational in light of the overwhelming proof at the arbitration hearing that the JV's shares had substantial value. This part of the award is not supported and must be set aside. It also was imperfectly executed.

3. The Arbitrator had sufficient evidence of damages and disregarded the law in failing to award any amount of damages.

The record is abundantly clear that the Arbitrator had sufficient evidence before him on which he could make an award of damages to Pasha for breach of the Transfer Agreement. Instead, he chose to say that there was absolutely no evidence or testimony on damages. Nowhere does the Arbitrator ever find that there was evidence and testimony on damages and that he finds that it was inadequate or insufficient, nor does the Arbitrator ever say that he has reviewed the evidence and testimony and finds that Pasha is not entitled to an award of damages. Instead, the Arbitrator erroneously claims that there was no evidence or testimony of damages, which is blatantly untrue. This shows a total disregard for the testimony and evidence in the Arbitrator's Award on Pasha's breach of contract claim as such damages are an element of the cause of action that was to be decided, as a matter of law, by the Arbitrator. This is a manifest disregard of the law.

4. The Arbitrator disregarded the law on specific performance.

The finding that Pasha cannot receive equity in the form of specific performance of the Transfer Agreement because he did not do equity is directly contradicted by the Arbitrator's

findings denying Jansheski any relief on his tort claims against Pasha and finding that each of Jansheski's claims lacked merit. The finding that Pasha did not do equity is also rebutted by the Arbitrator's rulings that Jansheski had no defense of duress, that Pasha had done nothing wrong and that none of Pasha's actions towards Jansheski rose to the level of a breach of fiduciary duty.

There has been a manifest disregard of the law in the Final Award because based on the Arbitrator's own findings, Pasha's negotiations for the 24.5% of the shares were, as a matter of Delaware law, clearly permissible and could not, as a matter of law, be found to be improper in any way.

In Delaware, the Chancery Court "has consistently refused to apply the doctrine of unclean hands to bar an otherwise valid claim of relief where the doctrine would work an inequitable result." (*Dittrick v. Chalfant*, 948 A.2d 400, 408, fn. 18 (Del. Ch. 2007) (court ordered specific performance of a land sale contract requiring the seller to perform his contractual obligation).) Since the Arbitrator failed to award any damages whatsoever for the failure to provide 24.5% of the shares of the JV, it would be grossly inequitable to apply the doctrine of unclean hands to prevent Pasha from receiving the promised shares. This would especially be the case since the Arbitrator found that there was no evidence "of the existence" of damages for the breach of the Transfer Agreement. If not having the shares by itself did not establish "resulting damages," then there would little harm in requiring that these shares be transferred to Pasha as Jansheski agreed to do in the Transfer Agreement.[3] In its totality, not awarding any amount of damages and then not requiring specific performance is a manifest disregard for the law, especially in light of the express findings that Pasha did not breach any legal duty and Jansheski was not under duress.

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[3] For the doctrine of unclean hands to apply, "there must be some sort of fraud or sharp practice on the part of the litigant against whom the defense is offered . . . this required element [is] of unscrupulous practices and overreaching." [Citation omitted.] (*Dittrick v. Chalfant*, *supra*, 948 A.2d at 408 (Del. Ch. 2007).)

The Final Award recognized that Pasha was worried about his livelihood, that the distribution of the DenTek products had become 90-95% of Passion's business, and that once Pasha's interest in the JV was sold, the greatest part of everything would be gone. The Arbitrator also found that Pasha was thusly motivated to obtain the best deal for himself. (Final Award, pp. 39-40.) The Arbitrator then found that Pasha was acutely aware of Jansheski's need to purchase Pasha's 50% share of the JV in order to close the TSG deal. It was on this exact point that the Arbitrator had earlier concluded that although Pasha knew of these things, it did not cause Jansheski to be under duress. The Final Award then concludes that Pasha's conduct "did not rise to the level of a breach of fiduciary duty, it nevertheless was inequitable and cannot be rewarded with equitable relief." (Final Award, p. 39.) The Arbitrator's findings and conclusions that Jansheski was not under duress because of Pasha's actions and Pasha's allegedly inequitable conduct are in clear conflict with one another. In order to reach his equitable conclusion, the Arbitrator had to disregard the same law he had relied on in dismissing Jansheski's defense of duress.

It was and is undisputed that under Delaware law, a negotiating party can be aggressive in pursuing his own interests as Pasha did. Such conduct is a necessary part of the bargaining process. It is not wrongful to drive a hard bargain. Even a threat not to perform is not an improper threat in negotiations. This is part of the bargaining process. (*Coca-Cola Bottling Co. v. Coca-Cola Co.*, 769 F.Supp. 671, 738-739 (D. Del. 1991).) Even threats and related activity are nothing more than "hard-bargaining business tactics" even if one of the parties is in financial difficulty. (*Edge of Woods v. Wilmington Sav. Fund Society*, 2001 Del. Super. LEXIS 304 at *16-17 (Del.Super.Ct. Aug. 16, 2001).)

Under Delaware law, the fact that Pasha protected his own best interests would not be wrongful or illegal in any manner. It cannot be held against Pasha as a basis to deny him specific performance of the Transfer Agreement and receipt of his 24.5% of the JV. This is especially the case since the Arbitrator was unable to award any damages for the breach of the Transfer Agreement. The Final Award's denial of specific performance results in a grossly inequitable result.

This Court must vacate and/or remand this part of the Final Award under the FAA. The Final Award on this point is flawed since the Arbitrator applied his own "notions of substantial justice" (*Oxford Health Plans LLC v. Sutter, supra*, 133 S.Ct. at 2068 (2013)).

F. The Final Award Is Incomplete And Contradictory.

"Courts will not enforce an award that is incomplete, ambiguous, or contradictory. [Citations omitted.] (*Bell Aerospace Co. Div. of Textron, Inc. v. International Union, United Auto., etc.*, 500 F.2d 921 (2d Cir. N.Y. 1974).) The Second Circuit held that when "when the language of the award appears to be contradictory" the court is:

> "bound to commit the matter to further arbitration. ***The purpose of arbitration is to resolve disputes, not to create new ones. An award which does not fulfill this purpose is unacceptable.***" [Emphasis added.] (*Id.*, at p. 924.)

The Final Award does not appear to be contradictory, it is contradictory. The findings that the Transfer Agreement was enforceable and that the defenses of lack of consideration and duress were without merit are entirely contradicted by the finding that there was no evidence that the failure to transfer the shares in the JV caused any damage. The same is also true about the finding that specific performance was improper since while Pasha did nothing legally wrong it would be inequitable to provide Pasha the shares since he was a hard negotiator.

V. CONCLUSION.

For the foregoing reasons, Petitioner Pasha respectfully submits that the Petition should be granted and that the Court vacate and/or remand the Final Award as to the issue of damages on the breach of Transfer Agreement and implied covenants and specific performance claims in Pasha's counterclaim.

Dated: February 7, 2014
Hackensack, New Jersey

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